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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 440

IN RE PETITION OF A. & H. TRANSPORTATION, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Mark R. Joelson
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Washington 6, D. C.

Counsel for Petitioner

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IN THE

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No. _____

IN RE PETITION OF A. & H. TRANSPORTATION, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. & H. Transportation, Inc., Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on June 7, 1963.

Opinions Below

The opinion of the United States District Court for the District of Maryland was entered on April 18, 1963 and is reprinted herein as Appendix C, 5a. The opinion of the United States Court of Appeals for the Fourth Circuit was decided on June 7, 1963 and is reprinted herein as Appendix B, 3a.

Jurisdiction

The judgment of the United States Court of Appeals for the Fourth Circuit which is here sought to be reviewed was dated and entered on June 7, 1963. The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254(1).

Question Presented

Does a citizen who has suffered severe economic injury as a result of a conspiracy in violation of the criminal laws of the United States, have a right, under the federal Constitution, to appear before a federal Grand Jury in order to provide the jury with evidence of the commission of the crime?

Constitution and Statutes Involved

The provisions of the federal Constitution involved in this case are Amendments I and V of the Constitution. The statutes involved in the case are Rule 6(a) of the Rules of Criminal Procedure, and Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. Secs. 1 and 2). These constitutional and statutory provisions are printed in Appendix A, 1a-3a.

Statement of the Case

Petitioner sought and was deprived of the right to appear before either a regular or special Grand Jury, in order to give information, including the names of other witnesses, to support an investigation and indictment of the major oil companies for violation of the federal antitrust laws. In order to understand why your Petitioner asked to testify before the Grand Jury, it is necessary to summarize the events that preceded his first letter to the Foreman of the Grand Jury, of June 9, 1962 (See Appendix D, 7a).

Petitioner is engaged in the business of selling gasoline at retail through eight gasoline service stations in the Baltimore, Maryland area. The eight service stations trade under the name "Savon Gas" and are regarded in the trade as "independents," that is, large, multi-island stations selling "off-brand" gasoline at thrift prices, in competition with stations of the major oil marketing and producing companies, known as "the majors".

In the Baltimore area, prior to 1960, the price of gasoline as sold by the independents was approximately 2¢ a gallon lower than the prevailing prices charged by the majors. For this reason, the "off-brand" or independent gasoline operator showed promise of capturing a significant portion of the retail trade. The independent constituted a real threat to the virtual monopoly which the majors heretofore enjoyed. More and more buyers developed the hab. of "discount buying;" the continued growth of the independent seemed assured.

Beginning in 1961, to the present time, the majors in the Baltimore area have followed a carefully conceived plan designed to stultify the growth of the independent, to harm him financially, and ultimately to destroy him. Introduction of new, so-called "fighting brands" (Gulftane and Sunoco 190) was a part of the plan. But the center of the attack was the manipulation of the price of gasoline at the retail level. No longer was the independent permitted to post a 2¢ differential. The majors moved their prices down. The independent was forced to lower his price, in order to compete. The majors followed and a downward spiral was set in motion. Very soon a point was reached at which the independent could not survive. The majors knew where this point was. For the independent is a marketer, not a refiner; his sources of gasoline are the majors themselves. The majors, who knew the whole-

sale price which the independent had to pay for gasoline, dropped their retail prices below this level. The price war hurt all the participants, but the majors had the financial ability to ignore their losses; the independent did not.

Selling by the majors at severely depressed prices continued for a period, when, magically and mysteriously, the prices of the majors returned to normal. The independent quickly followed, raising his price to within 2¢ of the postings of the majors and hoping for the preservation of normalcy. The hope was shortlived. Soon the majors forced prices down again, eventually below the independent's cost, and even, on occasion, below the majors' cost. And then, once again, having wounded the independent, but not yet mortally, prices were raised again.

Since 1960 the down and up price movement has been repeated so often that Petitioner has lost count. This price manipulation has been a subtle, persistent and effective way of destroying the independent. And the plan has worked. A number of independents have either been driven out of business or have been forced to sell. The remaining few, including Petitioner, have been seriously hurt financially and their ability to withstand further losses is doubtful. Most important of all, the growth of off-brand gasoline business in the Baltimore area has ceased.

This attack on the independent is a concerted conspiratorial plan of the majors in violation of federal criminal law. Your Petitioner is aware of the difficulties of proving this crime. The pattern in Baltimore is not unique. It has been repeated in other sections of the country. Recently, on similar facts, the Justice Department obtained indictments against certain oil companies, but was unable to secure a conviction. The difficulty is in proving that the volatile price movement was not accidental or the result

of competitive factors, but was the product of a concerted plan directed at the independent.

Petitioner believes, however, that the reason why proof is unusually difficult in a case such as this is due not only to the care used by the conspirators in hiding the scheme, but equally as important, to the pervasive power of the oil interests. An independent retailer who depends upon a major oil company for his supply of gasoline is hesitant to volunteer evidence involving his supplier. The independent is also aware that the major oil companies are no strangers in the political arena, that on the contrary they constitute what is widely considered to be the strongest lobby in Washington, with frighteningly powerful influence. Under such circumstances, the independent retailer may be unwilling to talk openly and candidly to a government representative. While he has no reason to distrust any particular public officer, nevertheless, he is unsure of his position and feels exposed and unprotected.

Providing the same information to a Grand Jury is entirely different. Here, the independent is speaking in trust and confidence to his fellow laymen. The information and testimony he gives the Grand Jury is and remains *secret*.

Beginning in June of 1962, your Petitioner wrote to the Foreman of the Grand Jury, asking for permission to appear in order to give testimony of the criminal violations described above (See Appendix D, 7a-16a). In doing so, Petitioner was confident that he could supply direct and compelling evidence of the criminal conspiracy. Further, Petitioner indicated that not only would he testify, but he would also provide the Grand Jury with the names of other witnesses. The obvious implication was that these other witnesses, under oath, would support your Petitioner's

testimony. After two months of futile letter writing, during which time your Petitioner suffered daily economic losses, but was put off by the Foreman, he had no choice but to bring his grievances to the attention of the District Court.

Your Petitioner asked both the District Court and the Court of Appeals to require either a regular or special Grand Jury in the District of Maryland to permit him to appear and provide information of violations of the federal antitrust laws in Maryland by the major oil companies. On the refusal of either Court to direct a Grand Jury to hear his testimony, and believing that an important question of constitutional law is raised by this refusal, he files this petition.

Reasons for Granting the Writ

The refusal of the lower courts to permit Petitioner to appear before either a regular or special Grand Jury raises an important question of federal law, which should be settled directly by this Court. Further, this refusal is in conflict with numerous expressions of this Court, and as such is sufficient to call for an exercise of this Court's powers of supervision.

Your Petitioner believes that a citizen who has suffered severe economic injury as a result of a conspiracy in violation of the criminal laws of the United States has a right, under the Constitution, to appear before a federal Grand Jury in order to bring to its attention the commission of the crime.

The First Amendment of the Constitution guarantees to each citizen the right to petition the Government for redress of grievances. No organ of the judiciary, or for that matter, of the entire government, is more appropriate to

receive such a petition and to hear the allegations of crime and personal grievance than the federal Grand Jury.

In *United States v. Johnson*, 319 U.S. 503, 512, 63 S. Ct. 1233, 1237, 87 L. Ed. 1546, Mr. Justice Frankfurter characterized the Grand Jury as "a great historic instrument of lay inquiry into criminal wrongdoing." On numerous occasions the Court has called attention to "the well-recognized power of the Grand Jury to consider and investigate any alleged crime within its jurisdiction". *Sullivan v. United States*, 348 U.S. 170, 75 S. Ct. 182, 99 L. Ed. 210. See also, *United States v. Thompson*, 251 U.S. 407, 40 S. Ct. 289, 64 L. Ed. 333; *Blair v. United States*, 250 U.S. 273, 39 S. Ct. 468, 63 L. Ed. 979; *Hale v. Henkel*, 201 U.S. 43, 26 S. Ct. 370, 50 L. Ed. 652; *Frisbie v. United States*, 157 U.S. 160, 15 S. Ct. 586, 39 L. Ed. 657.

The Grand Jury's impressive stature derives from the public's belief that its investigations are politically impartial and independent of the executive and legislature. This belief results no doubt from the identification in the public mind of the Grand Jury with the judiciary. See Edwards, "*The Grand Jury*," 40-41 (1906); Kaufman, "*The Grand Jury, Its Role and Its Powers*," 17 F.R.D. 331, 334 (1955); Note, "*The Grand Jury As An Investigatory Body*," 74 Harv. L. Rev. 590, 603-04 (1961).

In comparison with the Grand Jury, the local District Attorney is hampered in the conduct of an investigation by his lack of power to subpoena witnesses, as well as by his inability to grant immunity from prosecution. Moreover, he may fail to investigate allegations of crime for political reasons. Although he, himself, may be untainted, still he may be "sensitive to the delicacy" of investigating persons upon whom he or his superiors is dependent for electoral support. See Scigliano, "*The Grand Jury, The*

Information and The Judicial Inquiry," 38 Ore. L. Rev. 303, 309-310.

Virtually all authorities who have studied the problem agree that the Grand Jury is not being fully utilized, generally because of the control exerted over it by the local prosecuting attorney. See Willoughby, *Principles of Judicial Administration*, (1929); Dession and Cohen, *The Inquisitorial Functions of Grand Juries*, 41 Yale L.J. 687, (1932); Konowitz, *The Grand Jury As An Investigating Body of Public Officials*, 10 St. John's L. Rev. 219 (1936); Nahum and Schatz, *The Grand Jury in Connecticut*, 5 Conn. B.J. 111 (1931); Mayers, *The American Legal System*, 125-27 (1955).

In all the states, by constitutional provisions similar to the First Amendment, citizens are given the constitutional right to petition the State Government, or bodies thereof, for the redress of grievances. It is uniformly held by state courts that a petition by a citizen to appear before a Grand Jury, or to convene a special Grand Jury, to investigate an alleged crime is a proper method of exercising this constitutional right.

The Supreme Court of Alabama stated that public policy *demands* that a citizen be able to request an investigation by a Grand Jury of alleged crime or corruption in his city or state. *King v. Second National Bank & Trust Co.*, 234 Ala. 106, 173 So. 498 (1937). In *Brack v. Wells*, 184 Md. 86, 40 A. 2d 319 (1944), the Court of Appeals of Maryland outlined the procedure a citizen must follow in seeking the aid of a Grand Jury. The Court said that a citizen desiring to bring a Grand Jury's attention to alleged violations of criminal laws should exhaust his remedy before the Magistrate and State's Attorney, and, if relief cannot be had there, the citizens may then ask the Foreman of the Grand

Jury to hear his petition. (Petitioner here sought in vain to gain assistance from the Attorney General. See Appendix D, 9a).

In *Appeal of Hamilton*, 407 Pa. 366, 180 A. 2d 782 (1962) the Supreme Court of Pennsylvania, both in its majority and dissenting opinions, did not question the right of a citizen to petition to convene a special Grand Jury to investigate alleged corruption in the City Government, but a majority of the court denied petitioners a right of appeal from the lower court's denial of the petition because petitioners could not show any personal injury to themselves, and thus, as appellants, were not "parties aggrieved." Chief Justice Bell, however, entered a strong dissent.

In recognizing the constitutional right of a citizen to petition for redress of grievances by seeking the aid of the Grand Jury, the courts further protect this right by insuring that the petitioning citizen's complaint will not be dismissed without first being heard by the Grand Jury itself. For example, see *Ogden v. Hunt*, 286 P. 2d 1088 (Okla. 1955), in which the Supreme Court of Oklahoma said that the ordering of a Grand Jury and the presentation of such petition to it is mandatory and not within the discretion of the judge to whom the petition is presented.

The language of Rule 6(a) of the Federal Rules of Criminal Procedure (Appendix A, 1a) is broad in scope and sufficient to require a court to permit an aggrieved citizen the right of access to a Grand Jury. It seems obvious that the court should not interpose itself between the citizen and the Grand Jury, by requiring the citizen first to detail his grievances to the court. The secrecy of the Grand Jury guarantees that his disclosure will be confidential. Disclosure to the court assures the opposite.

It was for this reason that the petition filed in the District Court set forth only the nature of the Petitioner's griev-

ances, and referred to the *Delway* case, and the incidents related in that complaint, as an *example* of the predatory practices used by the major oil companies.

It is widely recognized as undesirable for judges to investigate allegations of crime. In holding unconstitutional a New York statute giving the Governor power to appoint a judge to investigate charges of municipal corruption, then Judge Cardozo noted that: "Centuries of common law tradition warn us with echoing impressiveness that this is not a judge's work." *In the Matter of Richardson*, 247 N.Y. 401, 412, 160 N.E. 655, 658 (1928).

Nor should it be lightly presumed that Congress, by also providing private remedies, under the antitrust laws, to an aggrieved person, intended to invade his freedom to petition the Grand Jury. Indeed the private remedy is a hopeless one if a citizen, already hurt financially, is without resources to launch and sustain a private suit.

In the April, 1962 issue of *The Atlantic* at pages 58 and 60, Judge Irving Kaufman summarizes the role of the Grand Jury as follows:

> "The importance of the Grand Jury's role in screening cases stems from the fact that it is generally the first nonexecutive power to review criminal cases. Here it serves as the people's shield against unfair accusations. However, its unique position may also require that it be a sword against the unjustified refusal of an executive to prosecute. If the executive refuses to initiate criminal proceedings against wrongdoers, the Grand Jury may . . . . But whether used as a sword or a shield it is an implement of the public, the unofficial, non-governmental public. It is the citizen's personal entry into government and justice."

The criminal conspiracy which your Petitioner seeks to reveal has caused him serious economic harm. His griev-

ances are both personal and public. The right of petition to redress these grievances is one of the freedoms protected by the Bill of Rights, and the action of the lower courts in denying his petition to the Grand Jury is an unwarranted invasion of that freedom.

Conclusion

For the foregoing reasons Petitioner urges this Court to grant the writ of certiorari.

Respectfully submitted.

Mark R. Joelson
1000 Federal Bar Building
Washington 6, D. C.
Counsel for Petitioner

APPENDIX A

Constitution and Statutes Involved

United States Constitution, Amendments I and V:

ARTICLE [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * * * *

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * *

Federal Rules of Criminal Procedure, Rule 6(a):

Rule 6. The Grand Jury

(a) Summoning Grand Juries. The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement

United States Code, Title 15, Sections 1 and 2:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That

nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209; August 17, 1937, Chap. 690, Title VIII, 50 Stat. 693; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 1.]

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not

exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. [July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209; July 7, 1955, Chap. 281, 69 Stat. 282; 15 U.S. Code, Sec. 2.]

APPENDIX B

Opinion of
United States Court of Appeals
For The Fourth Circuit

No. 9017

In Re Petition of A & H Transportation Inc., For The Organization of a Special Grand Jury

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Appeal from the United States District Court for the District of Maryland, at Baltimore
Roszel C. Thomsen, Chief Judge

On Petition for a Writ of Mandamus to the United States District Court for the District of Maryland

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(Argued June 4, 1963 Decided June 7, 1963)

Before Haynsworth and Bell, Circuit Judges, and Barksdale, District Judge

---

Harry Waller, as President of A & H Transportation Inc., Pro Se, and Arthur J. Murphy, Jr., Attorney, Department of Justice, (Lee Loevinger, Assistant Attorney General, and Robert B. Hummel, Attorney, Department of Justice, on brief) for the Department of Justice.

Per Curiam:

The petitioner, A & H Transportation, Inc., sought to have the District Court of Maryland convene a special

grand jury under instructions to investigate alleged violations of the antitrust laws by the major oil companies doing business in the Baltimore area. The application was considered in an opinion filed April 18, 1963, written by Chief Judge Thomsen of the District Court of Maryland, with the concurrence of Judges Watkins, Northrop and Winter, the other Judges of that Court. The petitioner has sought to bring the matter here by appeal. Since it clearly is an unappealable order, we have treated the notice of appeal as a petition for a writ of mandamus to require the District Court of Maryland to convene a special grand jury and require it to conduct the kind of investigation the petitioner seeks.

It appears that Mr. Waller, the petitioner's president, has presented complaints of alleged violations of the antitrust laws to the Department of Justice. Though there has been some official inquiry, no indictments have been returned or requested. Mr. Waller has also written to the foreman of a regularly convened grand jury in Baltimore. That grand jury did not care to hear him, however, though his communications were passed on to the District Attorney. Earlier, one of Mr. Waller's companies, Savon Gas Stations, had brought a civil antitrust action against Shell Oil Company, in which the defendant prevailed.[1]

When its petition was presented to the District Court, the petitioner also presented a certified copy of the record in an unrelated action, Del-Way Petroleum Company, Inc., et al., v. Cities Service Oil Company, a case in the District Court of Maryland which was ended before trial.

We have considered all of the foregoing matters in addition to the petitioner's allegations that the major oil companies are engaged in conspiracies to fix prices in the Baltimore area, are selling gasoline at prices below their cost, and are engaging in other practices designed to or having the effect of driving independent oil dealers out of business.

[1] Savon Gas Stations No. 6, Inc. v. Shell Oil Company, 203 F. Supp. 529, aff'd 4 Cir., 309 F. 2d 306.

The authority to convene or discharge a grand jury is vested in the District Court.[2] Its exercise of its discretion to convene, or not to convene, a special grand jury, or to discharge a grand jury, is not reviewable on appeal, and a Court of Appeals cannot by mandamus, or any other extraordinary writ, inject itself into the discretionary area reserved to the District Court.[3]

We find here no such abuse of discretion as would justify issuance of the extraordinary writ of mandamus. It is evident from the Court's opinion that it gave careful consideration to the petitioner's request and to the alternative remedies, including a civil action for treble damages, available to the petitioner.

Since we find no abuse of the discretion lodged in the District Court, the petition for a writ of mandamus must be dismissed.

Dismissed.

APPENDIX C

Opinion of The United States District Court For The District of Maryland

(Filed April 18, 1963)

Thomsen, Chief Judge

On or about March 15, 1963, Harry Waller and his counsel came to see me in my chambers. Waller handed me an elaborate document and requested that this Court organize a special grand jury to investigate what Waller claimed were violations of the anti-trust laws by large oil companies. Waller added that the Department of Justice had failed or refused to present the matter to a grand jury, although he had taken the matter up with the United States Attorney and understood that an investigation had been made or was in progress. After tell-

[2] Rule 6, Federal Rules of Criminal Procedure.

[3] In re Texas Co., D.C. Cir., 201 F. 2d 877, Morris v. United States, 5 Cir., 128 F. 2d 912.

ing Waller something about the practice before grand juries, I reminded his counsel of his right to proceed under section 4 of the Clayton Act, 15 U.S.C.A. 15, but agreed to forward the document to the United States Attorney for this district and to ask about the present status of the investigation. Before the United States Attorney could reply, Waller requested that the document be returned to him; this was done.

On or about April 3, 1963, Waller delivered to me as Chief Judge of this Court a ten-page document entitled "Petition of A & H Transportation, Inc." which formally prays that the Court "forthwith empower a special Grand Jury to investigate both the civil and criminal violations of the Sherman Anti-Trust Act, the Clayton Anti-Trust Act and the Robinson-Patman Price Discrimination Act, as alleged in the case of *Del-Way Petroleum Company, Inc. and Hallie D. Hutchinson, Plaintiffs, vs. Cities Service Oil Company, Defendant*, said case being docketed in the United States District Court for the District of Maryland as Civil Action No. 12952, and any other prevailing illegal and unlawful conspiracy which is relative to and connected with the existing price wars in the State of Maryland."

The Court has read and considered that petition. The Court is advised that Waller has heretofore presented to the Department of Justice the facts contained in the petition, that an investigation was begun which has not yet resulted in the Government seeking any indictments, and that Waller has also testified before a Congressional Committee on the same general subject. The Court is also aware of the case of *Savon Gas Stations No. 6 v. Shell Oil Company*, which one of Waller's corporations instituted in this Court and lost, 203 F. Supp. 529. Judge Winter's decision was affirmed on appeal, 4 Cir., 309 F. 2d 306.

After considering the petition and all the circumstances, including the rights granted by 15 U.S.C.A. 15, the Court declines to organize a special grand jury as prayed.

Judges Watkins, Northrop and Winter authorize me to say that they concur in this decision.

ROSZEL C. THOMSEN,
Chief Judge, U.S. District Court.

APPENDIX D

EXHIBIT No. 1

June 9, 1962

Hon. Paul Louis Faustman
Foreman of the U.S. Federal Grand Jury
222 Goodale Road
Baltimore 12, Maryland

My dear Mr. Faustman:

The case of Del-Way Petroleum, Inc., et al, Plaintiffs, vs. Cities Service Oil Company, Defendant, was filed sometime during the summer of 1961 in the U.S. District Court for the District of Maryland. The papers filed in that case reveal the trials and tribulations caused by a member of the Big Oil Monopoly, and this can be brought up-to-date by the addition of the names of Gulf Oil and Sun Oil, et al.

I sincerely believe that the guaranteed constitutional rights of Little Oil Business Men are now being violated on a daily basis, as well as the Robinson-Patman Act, the Clayton Act, and the Sherman Act, notwithstanding our pleas and pleadings with every known Federal enforcement Agency; namely, the FTC, Dept. of Justice, and the Executive Branch. Consequently, I implore you to examine me and other witnesses within the confines and secrecy of the Grand Jury Room, with more facts and pertinent documents.

Any and all help that you can possibly render at this time to prevent the success of Big Oil's predatory practices in eliminating the independent segment of the oil

business would be beneficial to the citizens of the United States.

Most respectfully submitted,

HARRY WALLER, President,
SAVON GA$ $TATION$.

HW mc

EXHIBIT No. 2

June 14, 1962

Mr. Harry Waller, President
Savon Gas Stations
Baltimore 3, Maryland

Dear Mr. Waller:

This is to advise you that Mr. Faustman, the Foreman of the Federal Grand Jury for the June Term has discussed with me your letter of June 9, 1962, and your complaints relative to violations of Federal law.

I will personally take up these matters with the Department of Justice and request that your complaints be investigated. In the meantime, I would be happy to talk with you personally about the Route 40 situation and any other information bearing on your allegations.

Yours very truly,

JOSEPH D. TYDINGS,
United States Attorney.

CC:
Honorable Paul Lewis Faustman
Foreman, Federal Grand Jury
222 Goodale Road
Baltimore 12, Maryland

EXHIBIT No. 3

June 21, 1962

Hon. Paul Louis Faustman
Foreman of the U.S. Federal Grand Jury
222 Coodale Road
Baltimore 12, Maryland

Dear Mr. Faustman:

I duly received United States Attorney Joseph D. Tydings letter of June 14th which apparently is meant as an answer to my letter to you of June 9th, 1962.

First of all, let me say that I have the highest regard for Mr. Tydings. He has many problems and is, undoubtedly, a very devoted public servant; but I must point out that in some respects his hands are tied by Administrative rulings.

It is true that the Sherman Act in Section 4 provides that in civil suits to prevent and restrain violations of the Act that the United States District Attorneys can act only "under the direction of the Attorney General". However, the law is silent as to criminal actions. Nevertheless, Mr. Tydings' hands are tied by Administrative instructions in the District Attorney's Manual which require the same "direction" from the Attorney General in Washington before he can institute criminal proceedings.

It is because of this knowledge on my part that Mr. Tydings could not take an action that I wrote you on June 9th; plus the fact that the officials in Washington have failed to act on my many pleas to institute proceedings to determine whether the anti-trust laws had been violated in the Del-Way Petroleum-Cities Service Case.

I would like to quote to you at length from a Supreme Court decision decided on March 12, 1906. I am sure that Mr. Tydings will concur that the quotations given are accurate. Incidentally, this was an anti-trust case. The

case is that of Hale v. Henkel, 201 U.S. at 43. At page 60 the Court stated: (emphasis supplied)

> "We are pointed to no case, however, holding that a grand jury cannot proceed without the formality of a written charge. Indeed, the oath administered to the foreman, which has come down to us from the most ancient times, and is found in Rex v. Shaftsbury, 8 Howell's State Trials, 759, indicates *that the grand jury was competent to act solely on its own* volition."

* * * * * * *

> "In a case arising in Tennessee the grand jury, without the agency of the district attorney, had called witnesses before them, whom they interrogated as to their knowledge concerning the then late Cuban expedition: Mr. Justice Catron sustained the legality of the proceeding and compelled the witnesses to answer. His opinion is reported in Wharton's Criminal Pleading and Practice, 8th ed. Sec. 337. He says: 'The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence generally, and to found presentments on the evidence of such witnesses; and the question here is, whether a witness thus introduced is legally bound to disclose whether a crime has been committed, and also who committed the crime'. His charge contains a thorough discussion of the whole subject."

* * * * * * *

And, at page 65 the Supreme Court continued:

> "We deem it entirely clear that under the practice in this country, at least, the examination of witnesses need not be preceded by a presentment or indictment formally drawn up, but *that the grand jury may proceed, either upon their own knowledge or upon the examination of witnesses, to inquire for themselves whether a crime cognizable by the court* has been committed; that the result of their investigations may be subsequently embodied in an indictment, and that

in summoning witnesses it is quite sufficient to apprise them of the names of the parties with respect to whom they will be called to testify, without indicating the nature of the charge against them."

* * * * * *

"While the grand jury may not indict upon current rumors or unverified reports, they may act upon knowledge acquired either from their own observations or upon the evidence of witnesses given before them."

I should point out that there were some dissenting opinions in this Hale v. Henkel case, but the dissents went to other propositions, mainly the question of searches and seizures under the Fifth Amendment. None of the dissenting opinions take issue with the Supreme Court's review of the powers of grand juries.

It would be most enlightening to you to read the entire decision of the Supreme Court in this Hale v. Henkel case. I am sure that Mr. Tydings' office would make volume 201 of the United States Supreme Court Reports available to you for such purpose.

The April, 1962 issue of the Atlantic Monthly contained a very interesting article by Federal Judge Irving R. Kaufman entitled "The Grand Jury: Sword or Shield". I recommend the reading of this entire article by you. However, let me invite your attention to one short quote Judge Kaufman says of the Grand Jury:

"* * * its unique position may also require that it be a sword against the unjustified refusal of an executive to prosecute. If the executive refuses to initiate criminal proceedings against wrongdoers, the grand jury may. The local district attorney who expects a grand jury tamely to confine itself to handling indictments in a few major cases may suddenly find that his own office is under searching investigation by that same body."

I again repeat the request contained in my letter to you of June 9th; namely, that the Grand Jury examine me and other witnesses within the confines and secrecy of the Grand Jury Room, with more facts and pertinent documents and thus carry on an investigation of the predatory pricing practices of the major oil companies in the Baltimore area to determine if the facts justify action under the Federal anti-trust laws.

Most respectfully submitted,

HARRY WALLER, PRESIDENT,
SAVON GA$ $TATION$.

HW mc

EXHIBIT No. 4

Baltimore, Maryland
June 26, 1962

Mr. Harry Waller
President
Savon Gas Stations
Baltimore 3, Maryland

Dear Mr. Waller:

Receipt is acknowledged of your letter of June 21st in connection with previous correspondence concerning complaints of alleged violation of Federal law.

I have discussed the matter with the Federal Grand Jury, and it is our feeling that before proceeding further we should await results of the action originated by Mr. Tydings which he is now personally progressing.

We shall see that you are kept fully informed of developments.

Sincerely yours,

PAUL LOUIS FAUSTMAN,
Foreman,
Grand Jury for the
District of Maryland,
June Term.

EXHIBIT No. 5

July 26, 1962

Hon. Paul Louis Faustman
Foreman of the U.S. Federal Grand Jury
222 Goodale Road
Baltimore 12, Maryland

Dear Mr. Faustman:

Since your letter of June 26, 1962 advising that the matter is being personally handled by Mr. Tydings, we have seen nothing but a new price war starting over again. It is quite apparent that the facts as stated in the Civil Action Case No. 12952 are being completely ignored or suppressed.

Enclosed please find copy of an article written by the Honorable Judge Irving R. Kaufman, which I think you would find most helpful in trying to help Litle Oil Business Men. Incidentally, I have taken the liberty of sending each member of your Panel a copy of this letter and the magazine article.

Please let me hear from you soon.

Respectfully submitted,

HARRY WALLER, PRESIDENT.
SAVON GA$ STATION$

HW mc

EXHIBIT No. 6

July 31, 1962

Mr. Harry Waller
President, Savon Gas Stations
Baltimore 3, Maryland

Dear Mr. Waller:

I have your letter of July 26, 1962, in connection with our previous correspondence.

Apparently every member of the panel received a copy of this letter as well as the magazine article entitled

"The Grand Jury — Sword and Shield" which accompanied it. It is assumed, of course, that in sending this literature to every member of the Grand Jury the purpose was an effort to be helpful, but for your information and future guidance, this panel, in accordance with long established court procedure, has been fully briefed by the Court as to its powers, functions, duties, responsibilities, etc., and we have been, and shall continue to be guided thereby.

It is regretted that we are not privileged at this time to give you the details of the present status of the investigation now in progress in connection with the matter which you brought to our attention on June 9, 1962, and upon which prompt action was initiated, but assurance is given that we shall continue to diligently proceed in the case with a view of bringing it to a prompt conclusion. When that is accomplished, you will be fully informed.

Sincerely yours,

PAUL LOUIS FAUSTMAN,
Foreman, Federal Grand
Jury June 1962 Term.

EXHIBIT No. 7

August 11, 1962

Hon. Paul Louis Faustman
Foreman of the U.S. Federal Grand Jury
222 Goodale Road
Baltimore 12, Maryland

My Dear Mr. Faustman:

Your letter of July 31, 1962 is hereby acknowledged.

It is with much regret that your continued evasive answers and promises of action have proven naught to date; and a newer and more devastating price war is upon us at this time.

However, apparently you and your advisors have seen fit to ignore the *Supreme Court* decision handed down on

June 25, 1962 in the Brown Shoe Case, wherein the U.S. Government attorneys declared:

> "This is the case and this is the time to call a halt to a trend that is otherwise certain to convert the shoe industry into *one of those oligopolistic industries in which a few large concerns exercise decisive control over the market structure*, and the *smaller companies that are able to survive continue on sufferance only so long as they follow the leaders.*
>
> * * * * * *
>
> "*Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry* and *upon small business.* Where an industry was composed of *numerous independent units, Congress appeared anxious to preserve this structure.*
>
> * * * * * *
>
> "*We cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency*, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time."

Still further, the *Federal Trade Commission* decision in the American Oil Company case of *June 27, 1962* wherein the Commission held the following:

> "There is also ample precedent for the ruling that a seller is not meeting competition or equalizing an actual competitive situation when it reduces the price of its product to the level of a competitor's product which normally sells at a lower price. * * * If two products usually sell in competition with each other at a price differential, it is unnecessary for the seller of the premium product to eliminate this differential in order to meet competition. In this case, the record clearly establishes that not only had the private brand gasoline, Paraland, traditionally sold at a lower price than the major brands but that the Shell station which

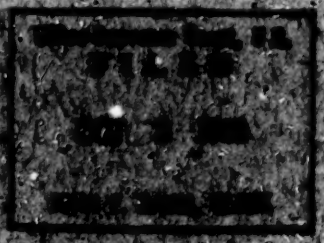
reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station. Under the circumstances, we think the hearing examiner was fully justified in concluding that the Shell station, with the assistance of Shell Oil Company, *had under cut the price of a private brand gasoline for the purpose of beating competition.*"

Quite frankly, Mr. Faustman, your continued acts of omission, I believe, are depriving myself and other independent Small Business Men of their rights to their place in a free economy guaranteed to us by the United States Constitution. Consequently, we have no further interest in you or your advisors' promises, and will carry the matter to His Honor, Chief Justice Earl Warren of the Supreme Court, with a presentation of the Del-Way Petroleum case facts and your failure to act accordingly; as well as a plea for a Blue Ribbon Grand Jury impaneling in the Baltimore area free from local domination.

Respectfully submitted,

HARRY WALLER, PRESIDENT,
SAVON GAS STATIONS.

HW/mc



No. [illegible]

In the Supreme Court of the United States

October Term, 1965

IN RE PETITION OF A. J. H. TRANSPORTATION, INC.,

Petitioner

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]

[illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 440

IN RE PETITION OF A. & H. TRANSPORTATION, INC.,
PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals and the district court have not yet been officially reported but are reprinted in Appendices B and C of the petition (Pet. 3a–7a).

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1963. The petition for a writ of certiorari was filed on September 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a writ of mandamus should issue to order a district court to summon a special grand jury to

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investigate violations of the antitrust laws alleged in general terms by petitioner.

STATUTES INVOLVED

Rule 6(a) of the Rules of Criminal Procedure is printed in Appendix A to the petition (Pet. 1a).

STATEMENT

Commencing in June 1962, petitioner's president, Harry Waller, wrote four letters (Pet. 7a, 9a, 13a, 14a) to the foreman of a grand jury then sitting in Baltimore, Maryland, requesting that he be called to testify regarding his allegations of violations of the antitrust laws by major oil companies. Mr. Waller was assured by the United States Attorney that his charges would be investigated (Pet. 8a) and was informed by the foreman that the grand jury had initiated prompt action to consider the matter (Pet. 14a).

In April 1963, A. & H. Transportation, Inc., petitioned the District Court for the District of Maryland to empanel a special grand jury to investigate similar asserted violations of the antitrust laws, stating that, although complaints had been made to the Department of Justice, the practices were continuing and were causing injury to petitioner (Pet. 6a). After reviewing these facts, Chief Judge Thomsen, with concurrences by Judges Watkins, Northrop and Winter, declined to summon a special grand jury (Pet. 5a–7a). The court noted petitioner's right under Section 4 of the Clayton Act (15 U.S.C. 15)

to proceed with its own action for violations of the antitrust laws.[1]

Petitioner, appearing by its president, pro se, then filed a "Notice of Appeal to Court of Appeals under Rule 73(b)." The court treated the notice "as a petition for a writ of mandamus to require the District Court of Maryland to convene a special grand jury and require it to conduct the kind of investigation the petitioner seeks" (Pet. 4a). After reviewing the history of petitioner's experiences with the various governmental authorities, as well as the matters alleged in its petition, the court dismissed the petition, holding that the district court had not abused its discretionary authority in refusing to convene a special grand jury.

ARGUMENT

The courts below correctly held that authority to convene a grand jury is vested in the sound discretion of the district court, that mandamus, as an extraordinary remedy, will issue only to correct serious abuses of that court's discretion, and that no such abuse occurred here. The petition presents no substantial question warranting review by this Court.

1. The issue on which petitioner, a corporation, now seeks review—whether it has a right to appear before a grand jury—was neither raised nor decided in the courts below. Contrary to the implication of the "Question Presented" in its petition (Pet. 2), peti-

[1] The court also noted (Pet. 6a) that one of Mr. Waller's corporations had instituted an action against Shell Oil Co. and lost. *Seven Gas Stations, Inc.* v. *Shell Oil Co.*, 203 F. Supp. 529 (D. Md.), affirmed, 309 F. 2d 306 (C.A. 4).

tioner never sought vindication of "a right * * * to appear before" a grand jury.

As the opinions below state, petitioner sought only to have a special grand jury called for the purpose of investigating its charges of widespread violations of the antitrust laws in the petroleum industry (Pet. 3a–6a). Indeed, petitioner's aim has been to force a grand jury to be called which would follow a plan of investigation shaped by petitioner, not simply to present its grievance, which had already been urged to virtually every interested government agency. Accordingly, there is no support in the record for its argument that the case presents an issue as to the right of a victim of a conspiracy "to appear before a federal Grand Jury in order to bring to its attention the commission of the crime" (Pet. 6).[2]

2. The issue decided by the courts below, whether mandamus should issue to require a district court to summon a special grand jury in the circumstances of the case, presents no question warranting review by this Court. The authority of the district court to summon and discharge grand juries (Rule 6, F.R. Crim. P.) is a broadly discretionary power to be exercised as the public interest may require. See, *Mc-*

[2] Petitioner's president, Mr. Waller, had vigorously pressed his complaints with a Congressional investigating committee, the Department of Justice and the grand jury. He had been assured by the grand jury foreman that the grand jury was pursuing the matter concerning which he had complained (Pet. 14a).

Dowell v. *United States*, 159 U.S. 596, 602.[3] The Court of Appeals for the Fifth Circuit, construing the statute which preceded Rule 6,[4] aptly summarized the authority of the district court (*Morris* v. *United States*, 128 F. 2d 912, 915, certiorari denied *sub nom. Lacy* v. *United States*, 317 U.S. 661):

> In short, the provision on which appellant relies merely negatives the power of others than a district judge, to draw a grand jury, and the statute as a whole, in terms confirms the implications of its first sentence that no one but a judge of a district court can draw a grand jury, and it is for him to say when and for what time grand juries may be drawn.

It is well settled that a writ of mandamus will not issue to a lower court except for a serious abuse of that court's discretion, and that this drastic remedy

---

[3] Rule 6(a) provides in part: "The court shall order one or more grand juries to be summoned at such times as the public interest requires." The Notes of the Advisory Committee on Rules (Notes following 18 U.S.C., Rule 6) state that "The first sentence of this rule vests in the court full discretion as to the number of grand juries to be summoned and as to the times when they should be convened."

[4] Section 284 of the Judicial Code, 36 Stat. 1165, as amended, 28 U.S.C. (1940 ed.) 421, provided in part:

"No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor * * *. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. * * *"

See Longsdorf, *The Beginnings and Background of Federal Criminal Procedure*, included in 4 Barron, *Federal Practice and Procedure*: 11 *Cyclopedia of Federal Procedure* (3d ed. 1952), § 41.16.

is reserved for extreme and unusual cases. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383. The same standard applies where the convening of a grand jury is in issue. See *In re Texas Co.*, 201 F. 2d 177 (C.A.D.C.), certiorari denied, 344 U.S. 904, where the court of appeals stated, "If any court has discretion to discharge this grand jury which is not shown to be ineligible * * * it is the District Court. We cannot invade any such discretion with the extraordinary writ of *mandamus*" (201 F. 2d at 179).

Petitioner has made no showing to warrant an appellate court's intercession here. Its petition to the district court presents only the broadest allegations, without supporting details or instances. For example, paragraph 5 contends that major oil producers in the Maryland area "are now engaged in an unlawful combination and conspiracy * * * to monopolize and attempt to monopolize the marketing of refined petroleum products"; that they "are selling gasoline, at retail, through their dealers and their affiliated (*sic*), at a price less than cost to the aforesaid dealers"; and that they "have entered into various agreements, understandings and arrangements among themselves and have done various things and performed various acts, including discrimination on certain price charges, granting freight allowances and granting protection allowances to its outlets and dealers and implementing the 'price war' conditions."

Such general allegations are clearly insufficient to warrant an appellate court's interference with the

broad discretion vested in the district court. See, *In re Petition for Special Grand Jury*, 50 F. 2d 973 (M.D. Pa.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
ARTHUR J. MURPHY, JR.,
Attorneys.

OCTOBER 1963.

U.S. GOVERNMENT PRINTING OFFICE 1963